

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ANGELA M. ISLEY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>GRANDMA HOERNERS FOODS, INC.</b>	)	
Respondent	)	Docket No. <b>1,035,636</b>
	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier request review of the July 30, 2008 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

**ISSUES**

The claimant suffered a work-related injury to her shoulder. Respondent provided claimant medical treatment which resulted in several referrals and ultimately a diagnostic arthroscopic procedure was performed on her shoulder. The surgery confirmed claimant suffered from multi-directional instability and another surgical procedure was recommended. But respondent denied that the multi-directional instability was caused by her work-related accident because she had not been diagnosed with instability until after she no longer worked for respondent; she had worked for other employers before instability was diagnosed and respondent's medical expert opined the instability could not have been caused by the described work-related injury. Consequently, respondent argued claimant failed to meet her burden of proof that the multi-directional instability was caused by her work-related injury.

The Administrative Law Judge (ALJ) ordered respondent to provide medical treatment on claimant's behalf with Dr. Larry F. Frevert. Temporary total disability benefits were denied by the ALJ. Implicit in the ALJ's decision is the determination that the diagnosed multi-directional instability was caused by claimant's work-related injury.

The respondent requests review of whether claimant's right shoulder instability arose out of and in the course of employment with respondent.

Claimant argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

On December 15, 2006, claimant picked up a box of empty glass jars and when she twisted to turn and set the box down on the table where she worked she felt a pop and experienced pain in her right shoulder. Claimant testified that it felt like her shoulder had popped out of its joint.

Claimant was later directed to Med-Assist for treatment which consisted of medications, physical therapy and work restrictions. A right shoulder MRI was performed on January 16, 2007, which showed no evidence of a rotator cuff tear. Claimant continued a regime of physical therapy.

Claimant was then referred to Dr. Michael Smith primarily to determine whether claimant's continued pain complaints were possibly the result of nerve impingement in her neck. An MRI was performed on claimant's cervical spine on May 17, 2007. The MRI revealed mild broad based disk bulging at the C5-6 level but it was determined there was no impingement on the spinal cord. Consequently, Dr. Smith concluded that claimant's shoulder complaints were not coming from her neck and he referred claimant to Dr. Peter Lepse to determine whether it might be appropriate to perform a shoulder arthroscopy.

On July 2, 2007, Dr. Lepse examined claimant and determined she had residuals of a muscular or tendinous strain injury with some scarring in the area. The doctor noted that there was no surgical solution for claimant's problem and that he had nothing further to offer. Dr. Lepse suggested claimant should be referred for a permanent impairment rating.

Dr. Lepse released claimant back to work and apparently provided conflicting releases as one released claimant with restrictions and the other released claimant without restrictions. Claimant had been off work from February 13, 2007 through July 2, 2007. In any event when she returned to work with respondent she was placed in a different job but claimant noted she was required to repetitively wipe off jars which made her neck and shoulder swell. She performed this job for approximately two weeks and then quit because her shoulder still hurt.

At her attorney's request, claimant was examined and evaluated by Dr. Lynn Curtis on July 19, 2007. The doctor diagnosed claimant with a right subscapularis muscle tear, right scapulocostal shoulder overuse syndrome, and cervical spine strain which claimant had aggravated after her return to work on July 2, 2007. Dr. Curtis recommended a second shoulder opinion about her rotator cuff pain and subscapularis tear. The doctor

placed restrictions on claimant of no lifting overhead or off the floor, no kneeling, crawling nor climbing ladders and no grasping with her right hand occasionally. Claimant should not walk on unprotected heights. Dr. Curtis opined that claimant was not at maximum medical improvement.

On October 2, 2007, claimant was examined and evaluated by Dr. Phillip L. Baker for an impairment rating at the request of respondent. The doctor diagnosed claimant as having scapulothoracic syndrome which is mildly symptomatic as well as mild round-shoulder posturing. Based upon the *AMA Guides*<sup>1</sup>, Dr. Baker opined claimant suffered a 6 percent permanent partial impairment to the right upper extremity. Dr. Baker opined claimant could return to work without restrictions. The doctor also recommended tension band exercises for the right shoulder girdle.

Because claimant still suffered shoulder pain she sought additional medical treatment. A preliminary hearing was scheduled but the respondent agreed to send claimant to Dr. Terrance Pratt. On December 26, 2007, Dr. Pratt examined claimant and diagnosed her with right shoulder pain, right shoulder syndrome and cervicothoracic syndrome with soft tissue involvement. Dr. Pratt recommended that claimant be seen by Dr. Larry Frevert, a shoulder specialist.

Dr. Frevert examined claimant and in his report dated February 8, 2008, he diagnosed claimant with "instability versus possible impingement." Dr. Frevert noted that the only way to know for sure would be to perform an arthroscopy on claimant's right shoulder. On June 19, 2008, Dr. Frevert performed the arthroscopic procedure on claimant's right shoulder which revealed multi-directional instability with minimal tearing of the labrum. Dr. Frevert recommended a surgical procedure to repair the instability.

Respondent then asked Dr. Baker his opinion whether the operative procedure suggested by Dr. Frevert was reasonable medical treatment. Dr. Baker opined that physical therapy and rehabilitation was a preferable method of treatment. Respondent also asked Dr. Baker whether the need for the operative procedure was causally related to the December 15, 2006 injury. Dr. Baker opined that the mechanism of injury would not produce multi-directional instability and he had not detected any shoulder instability when he had examined claimant in October 2007.

After claimant quit work for respondent she worked as a cashier at gas station for approximately 5 or 6 months and then at Southwest Publishing part time for a couple of weeks. She currently works as a supervisor for Aramark. Her job is to supervise the women inmates in the kitchen. Claimant testified she does not have to lift or perform any manual labor.

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<sup>1</sup>American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant testified that her shoulder pain continued and gradually worsened as she was undergoing physical therapy and when she returned to work for respondent. She testified:

Q. Have your complaints in your shoulder changed in any way since December of '06?

A. No, the same thing. Just gotten worse. It hurts more. That's it.

Q. That's what I'm trying to get at. They've gotten worse since December of '06?

A. I'd say that it has gotten worse because they've had me doing stuff that aggravated it. When they had me doing physical therapy I felt that aggravated it. They were having me doing pulls on my arms with a rubber band that I don't think I should have been doing.

Q. Can you compare your problems now versus your problems in August of 2007?

A. I would say it's still the same, it just hurts more. Just hurts more than it did back then.<sup>2</sup>

Claimant further testified that the jobs she got after leaving respondent were as light duty as possible because she did not want to have to use her arm and she has not suffered any additional injury to her shoulder.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>3</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>4</sup> And the claimant's testimony alone is sufficient evidence of her physical condition.<sup>5</sup>

Initially, it is significant to note that claimant's complaints and symptoms have been consistent throughout the multiple referrals and examinations. All of the doctors diagnosed injury to claimant's right shoulder but differed in their diagnosis. Dr. Baker opined that the instability could not have occurred in the accident because claimant was reaching

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<sup>2</sup> P.H. Trans. at 41-42.

<sup>3</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>4</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

<sup>5</sup> *Hanson v. Logan U.S.D.* 326, *supra*.

overhead and such activity could not cause instability. But claimant was not reaching overhead when she felt the popping sensation in her shoulder. And the fact that Dr. Baker stated he did not detect instability on his examination is refuted by Dr. Frevert's opinion that the only way to know for sure that claimant had instability was by performing the arthroscopic procedure. Claimant was referred to Dr. Frevert because he is a shoulder specialist and his opinion that the only way to know for sure whether claimant suffered shoulder instability was through the arthroscopic procedure is more persuasive than Dr. Baker's opinion that claimant did not have instability when he examined her for purposes of a permanent impairment rating. Simply stated, the fact that the doctors did not diagnose instability until the shoulder specialist made that diagnosis does not mean claimant did not have the condition from the outset. Especially where claimant's complaints and history of injury have been consistent.

Based upon the evidence compiled to date, this Board Member finds claimant has met her burden of proof to establish that the condition diagnosed by Dr. Frevert was caused by her accidental injury on December 15, 2007, and aggravated during physical therapy and upon her return to work with respondent before she quit her job.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>7</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated July 30, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2008.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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<sup>6</sup> K.S.A. 44-534a.

<sup>7</sup> K.S.A. 2007 Supp. 44-555c(k).